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No.

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES ROBERT PELTIER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-19a) is not yet reported.

JURISDICTION

The *en banc* judgment of the court of appeals (App. B, *infra*, pp. 20a-21a) was entered on May

9, 1974. On June 3, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including July 8, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether this Court's decision in *Almeida-Sanchez* v. *United States*, 413 U.S. 266—which held that a warrantless "roving patrol" search of an automobile for concealed aliens, conducted by Border Patrol officers acting without probable cause to believe that the vehicle contained any aliens, violated the Fourth Amendment's proscription against unreasonable searches and seizures, and that the evidence seized as a result of the search must be excluded at trial—should be applied retroactively to require the exclusion of evidence seized in similar searches conducted prior to the date of that decision.

STATEMENT

On March 7, 1973, an indictment was returned in the United States District Court for the Southern District of California charging that respondent had knowingly and intentionally possessed, with intent to distribute, approximately 270 pounds of marihuana, in violation of 21 U.S.C. 841(a)(1). Respondent's subsequent motion to suppress evidence was denied after a hearing. On May 17, 1973, after respondent waived his right to a jury trial, the case was submitted to the district court on the basis of stipulated facts and the transcript of the suppression hearing,

and the court found respondent guilty as charged. Respondent was sentenced to imprisonment for one year and one day, with immediate eligibility for parole pursuant to 18 U.S.C. 4208(a)(2), and to a special parole term of two years pursuant to 21 U.S.C. 841(b)(1)(B). The court of appeals, sitting *en banc*, reversed the judgment of conviction in a 7-6 decision and remanded the case to the district court with instructions to suppress the evidence seized in the search of respondent's automobile (App. A, *infra*, pp. 1a-19a).

1. It was stipulated at trial that respondent knowingly and intentionally possessed, with intent to distribute, the 270 pounds of marihuana that were discovered in his automobile by Border Patrol officers on February 28, 1973.[1] The facts surrounding the seizure of the marihuana were adduced at the suppression hearing through the testimony of the two Border Patrol officers who participated in the stop and search of respondent's vehicle. Respondent presented no evidence at the hearing.

Border Patrol Agent Charles Ainscoe testified that he and Agent William Pfiester were conducting a roving immigration patrol near Temecula, California, at about 2:30 A.M. on February 28, 1973, when they observed respondent traveling north on Highway 395, approximately 70 air miles from the Mexican

[1] The stipulation also stated that it "would not [have been] entered into had the defendant's motion to suppress in the case been granted" (Clerk's record, p. 24).

border (Tr. 5-6, 16).[1a] The officers knew that the road is frequently used by smugglers to transport aliens who have entered the country illegally (Tr. 8), and their suspicions were aroused because respondent was driving an old model car and appeared to be of Mexican descent (Tr. 16, 23).[2] They therefore pursued and stopped respondent in order to inspect his vehicle for the presence of concealed aliens (Tr. 7-8).

As Agent Ainscoe approached the vehicle, he observed that it bore out-of-state license plates, that respondent was alone in the car, and that there were some clothes in the back seat (Tr. 8, 17). He informed respondent that he was conducting a "routine immigration inspection," and he asked respondent to open the trunk of the car (Tr. 8). As respondent unlocked the trunk, Ainscoe observed that the key had attached to it a tag like those frequently used for rental vehicles (Tr. 9).

When the trunk was opened, the officer could see several suitcases and several plastic garbage bags (Tr. 10). The plastic bags appeared to the officer to contain kilo-size, rectangular bricks of marihuana (Tr. 11-13). "[T]hey were full of marijuana kilos, and they were pretty easily seen, they weren't symmetri-

[1a] When the officers observed him, respondent was approximately a mile and a half north of a fixed immigration checkpoint, which was not in operation at the time (Tr. 7). "Tr." refers to the reporter's transcript of the April 16, 1973, hearing on respondent's motion to suppress.

[2] The district court found that, while respondent "apparently * * * is of French extraction based upon his name, he does look to be dark-skinned and at night, that could easily be the case, that he would appear to be of Mexican descent" (Tr. 35).

cal, the edges were sticking out every which way" (Tr. 11). Ainscoe had seen marihuana bricks on 20 or 30 prior occasions, including instances when the bricks had been packed in plastic garbage bags (Tr. 12). As he reached into the back of the trunk to inspect the bags, the officer detected the odor of marihuana (Tr. 13), which he had previously smelled "dozens of times" (Tr. 22). He then tore open the bags and discovered the marihuana that respondent was charged with possessing (Tr. 13-14, 36).

2. In his motion papers and at the suppression hearing, which preceded this Court's decision in *Almeida-Sanchez* v. *United States*, 413 U.S. 266, respondent conceded that existing case law supported the Border Patrol's authority to stop and search vehicles for aliens without a warrant or probable cause. He argued, however, that, when the officer saw that the trunk contained no aliens, his authority ended and he could conduct a further search only if he had probable cause to do so. Respondent claimed that the officer's observation of the plastic garbage bags did not give him probable cause to believe that they contained contraband.

The district court denied the motion. It found that, in light of the officer's "experience in his job" (Tr. 36), he had probable cause to inspect the garbage bags "even before he smelled the marijuana, when he saw these protruding objects which, to him, resembled brick-shaped objects of marijuana" (Tr. 36-37).

3. On appeal, the government acknowledged that the search and seizure in this case was similar to the one declared unlawful by this Court in *Almeida-Sanchez*. We argued, however, that the ruling in *Almeida-Sanchez* should not be applied retroactively to searches conducted prior to June 21, 1973, the date of the decision in that case.

A divided court of appeals held that the rule of *Almeida-Sanchez* "should be applied to similar cases pending on appeal on the date the Supreme Court's decision was announced" (App. A, *infra*, p. 1a).[3] The majority concluded that the question of retroactivity was not truly presented, because *Almeida-Sanchez* "neither overruled past precedent of the Supreme Court nor disrupted long-accepted practice" (*id.* at 5a). The court conceded that several of its own pre-*Almeida-Sanchez* opinions since 1961, upholding the validity of warrantless *checkpoint* searches for aliens, "contain some dicta from which the government might infer that this Court would uphold a roving-patrol search" (*id.* at 6a, n. 2). It also acknowledged that it had expressly held in 1970 that "government agents on roving patrol can stop and search automobiles without either probable cause or warrant" (*id.* at 6a). *United States* v. *Miranda*, 426 F. 2d 283.

The majority reasoned, however, that "our line of decisions, and that of the Court of Appeals for the

[3] The court specifically reserved the question whether *Almeida-Sanchez* would apply in the case of a collateral attack upon a final conviction (App. A, *infra*, p. 1a).

Tenth Circuit * * *, permitting roving searches by the border patrol, enjoyed only brief acceptance and failed its first test before the Supreme Court" (*id.* at 7a). The court therefore concluded (*id.* at 9a):

> The Supreme Court in *Almeida-Sanchez* was not announcing a new legal doctrine, but correcting an aberration. Peltier is entitled to the benefit of the rule announced in *Almeida-Sanchez*, not because of retroactivity but because of Fourth Amendment principles never deviated from by the Supreme Court.[4]

The six dissenting judges, noting that both Mr. Justice Powell's concurring opinion and Mr. Justice White's dissenting opinion in *Almeida-Sanchez* recognized that the decision was a departure from the existing law in each of the three courts of appeals whose jurisdiction includes the Mexican border area (*id.* at 12a-13a),[5] concluded that, even under the majority's standards, "the rule of *Almeida-Sanchez*

[4] The court of appeals held in another *en banc* decision announced the same day as the present case (*United States* v. *Bowen*, C.A. 9, No. 72-1012, pending on petition for a writ of certiorari, No. 73-6848) that the rule of *Almeida-Sanchez* does not apply to searches at fixed checkpoints conducted prior to this Court's decision in *Almeida-Sanchez*. The court of appeals stated in *Bowen* (slip op. at 26) that, as applied to checkpoint searches, *Almeida-Sanchez* "overrules clear past precedent, both statutory and case law," and "disrupts a practice long accepted and widely relied upon."

[5] Mr. Justice Powell stated: "Roving automobile searches in border regions for aliens * * * have been consistently approved by the judiciary" (413 U.S. at 278). Mr. Justice White stated that the courts "have consistently and almost without dissent come to the same conclusion that is embodied in the judgment that is reversed today" (*id.* at 298).

is new" (*id.* at 13a) and the question of retroactivity must therefore be decided. The dissenting opinion reasoned that *Almeida-Sanchez* overruled established law, decisional as well as statutory,[6] concerning the Border Patrol's authority to conduct roving patrol checks of vehicles for aliens (*id.* at 13a-14a); that the prior law, though much of it was stated in dicta, had been "widely relied upon" (*id.* at 17a), and the "law enforcement practice, authorized for over a decade," had been "long accepted" (*id.* at 17a-18a); and that the result in *Almeida-Sanchez* "was not foreshadowed" (*id.* at 16a).

The dissenting judges therefore reached the question of retroactivity and, on the basis of the standards established by this Court in *Stovall* v. *Denno*, 388 U.S. 293, concluded that the deterrent purpose of the exclusionary rule would not be served by applying *Almeida-Sanchez* to roving patrol searches conducted prior to June 21, 1973 (App. A, *infra*, pp. 18a-19a).

REASONS FOR GRANTING THE WRIT

1. The decision of the court of appeals squarely conflicts with the recent decision of the Court of

[6] Under 8 U.S.C. 1357(a), immigration officers are given "power without warrant—* * * (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any * * * vehicle * * *." By regulation the term "reasonable distance" has been given an outside limit of "100 air miles from any external boundary" (8 C.F.R. 287.1(a)(2)).

Appeals for the Fifth Circuit in *United States* v. *Miller*, 492 F. 2d 37. In *Miller*, as in the present case, Border Patrol officers made a roving patrol stop of an automobile and asked the driver to open the trunk. When the driver said he did not have a key for the trunk, one of the officers opened the rear door of the car to identify some bulky items he had noticed in the back of the car. At that point, he detected the odor of marihuana. After the driver and the car were taken to the Border Patrol office, marihuana was found in the trunk of the car.

The search in *Miller*, like the search in this case, antedated this Court's decision in *Almeida-Sanchez*, and the issue was "whether *Almeida-Sanchez* should be given retrospective application" (492 F. 2d at 40).[7] The court held that the decision "should be given only prospective application" (*id.* at 42). The court's reasoning, which we believe is correct, is directly contrary to that of the majority of the court of appeals in the present case and in harmony with that of the dissenting opinion. "It is clear," the court stated, "that *Almeida-Sanchez* announced a 'new rule'" overturning "an unbroken line of decisions by this Court" (*id.* at 40, 41). The decision established "a new exclusionary rule which law enforcement officials could not have foreseen" (*id.* at 41).

[7] The court of appeals had previously upheld the search and seizure (477 F. 2d 595), but this Court had granted certiorari, vacated the judgment, and remanded the case for further consideration in light of *Almeida-Sanchez* (414 U.S. 896).

Looking, therefore, to the standards established by this Court in decisions concerning the retroactivity of new applications of the exclusionary rule in the context of Fourth Amendment violations, the court of appeals concluded that the deterrent purpose of the ruling in *Almeida-Sanchez*, the justifiable reliance of law enforcement officers on the prior rule, and the likely impact of retroactivity on the administration of justice suggest that *Almeida-Sanchez* should apply only to roving patrol searches conducted after June 21, 1973.

The Fifth Circuit subsequently held, relying upon *Miller*, that *checkpoint* searches conducted prior to *Almeida-Sanchez* are also unaffected by that decision. *United States* v. *Cook*, 492 F. 2d 747; *United States* v. *Merla*, 493 F. 2d 910 (referring to *Miller* as the court's "definitive opinion"). In another case, involving a roving patrol *stop* that led to probable cause before a search was conducted, the Fifth Circuit refused "to apply the teaching of *Almeida-Sanchez* to the facts of this case," because under *Miller* "the constitutional enlightenment provided by *Almeida-Sanchez* should not be applied to the analysis of official action occurring prior to the date of that opinion." *United States* v. *Rodriguez-Hernandez*, 493 F. 2d 168, 169.[8]

[8] The majority in the present case referred to three other decisions in which panels of the Fifth Circuit applied *Almeida-Sanchez* to searches conducted prior to the date of that decision (App. A, *infra*, p. 11a). Each was decided before *Miller*, and none contained any mention of the retroactivity issue. The panel that decided *United States* v. *Byrd*, 483 F. 2d 1196 (a roving patrol search case), subsequently granted the government's petition for rehearing, withdrew its initial opinion, and, acknowledging the authority of *Miller*, "abandon[ed] any reliance upon *Almeida-Sanchez*" (No. 73-1426, issued May 28, 1974). (The panel nevertheless reached the same result on the authority of other decisions, and the case is pending on the government's renewed petition for rehearing.)

United States v. *Speed*, 489 F. 2d 478 (a checkpoint search case), is pending on the government's petition for rehearing. A petition for rehearing in *United States* v. *McKim*, 487 F. 2d 305 (a roving patrol search case), was denied by the panel prior to the decision in *Miller*.

The Court of Appeals for the Tenth Circuit, though it has not decided the retroactivity of *Almeida-Sanchez* as applied to roving patrol searches, has held, incorrectly in our view, that the principles of that decision apply to checkpoint searches occurring prior to June 21, 1973, if the defendant preserved the issue at trial and on direct appeal. *United States* v. *King*, 485 F. 2d 353; *United States* v. *Maddox*, 485 F. 2d 361. The court's reasoning—that one who has raised the issue and whose case was pending at the time of this Court's decision should "be given the same relief as has been afforded in *Almeida-Sanchez*" (485 F. 2d at 359)—would appear to extend to roving patrol searches as well.

2. The conflict should be resolved by this Court. There are approximately 40 cases pending in the courts of appeals and a large but indefinite number pending in the district courts which involve the validity of warrantless roving patrol searches of vehicles conducted prior to June 21, 1973. The outcome of each of those cases may turn on whether *Almeida-Sanchez* applies retroactively. Many more cases would be affected if the decision in the present case were applied in the context of collateral attacks upon final convictions (see note 3, *supra*). Fair and effec-

tive administration of justice requires a definitive resolution of the issue.

3. In view of the importance of the question, the clear conflict between the courts of appeals, and the thorough treatment of the question by the dissent below and the Fifth Circuit in *Miller*, we do not here argue at length the merits of the retroactivity issue. We note, however, that in determining the retrospective or prospective effect of a new decision, this Court has repeatedly emphasized that "the purpose to be served by the new constitutional rule" is "[f]oremost" among the relevant considerations (*Desist* v. *United States*, 394 U.S. 244, 249). "This criterion strongly supports prospectivity for a decision amplifying the evidentiary exclusionary rule" (*ibid.*), because "the rule's prime purpose is to deter future unlawful police conduct" (*United States* v. *Calandra*, No. 72-734, decided January 8, 1974, slip op. at 9).

Although *Almeida-Sanchez* did not overrule a prior decision of this Court (cf. *Gosa* v. *Mayden*, 413 U.S. 665, 673), it was "a clear break with the past" (*Desist* v. *United States*, *supra*, 394 U.S. at 248). The Border Patrol, relying on explicit statutory authority to stop and search vehicles for aliens within a reasonable distance of the border (see note 6, *supra*) and on repeated and uniform judicial approval of the practice, had for many years conducted routine roving patrol operations in the border area. These operations were conducted in complete good faith, in the reasonable belief that they were entirely lawful. This long accepted practice and the law upon which

it rested cannot, we submit, properly be dismissed as "an aberration" (App. A, *infra*, p. 9a).

Almeida-Sanchez announced a new rule. No important purpose would be served by applying that rule to exclude evidence seized prior to the decision in the course of a search that the law enforcement officers reasonably believed was lawful. On the contrary, such application would be inconsistent with the purposes of the exclusionary rule and at odds with the principles of retroactivity of new Fourth Amendment rulings that have been developed by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1974.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73-2509

UNITED STATES OF AMERICA, APPELLEE

vs.

JAMES ROBERT PELTIER, APPELLANT

[May 9, 1974]

Appeal from the United States District Court for the Southern District of California

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Before: CHAMBERS, MERRILL, KOELSCH, BROWNING, DUNIWAY, ELY, HUFSTEDLER, WRIGHT, TRASK, CHOY, GOODWIN, WALLACE, and SNEED, Circuit Judges.

GOODWIN, Circuit Judge:

James Robert Peltier's appeal has been taken en banc so the full court can consider whether the rule announced by the Supreme Court in *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), *rev'g* 452 F. 2d 459 (9th Cir. 1971), should be applied to similar cases pending on appeal [1] on the date the Supreme Court's decision was announced. We hold that it

should, reverse Peltier's conviction, and remand the matter to the district court.

Peltier was convicted of possessing marijuana, with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). The evidence was discovered during a search conducted on February 28, 1973, by border-patrol agents on roving patrol on Highway 395 near Temecula, California.

On June 21, 1973, the Supreme Court, in its opinion reversing this court's *Almeida-Sanchez* opinion, held that border-patrol agents on roving patrol cannot stop and search automobiles pursuant to 8 U.S.C. § 1357(a) and 8 C.F.R. § 287.1 without probable cause or warrant.

The search in question here was of the same type as that condemned in *Almeida-Sanchez*. There, the search was conducted 25 miles north of the Mexican border, on a California east-west highway that lies at all points at least 20 miles north of the border. 413 U.S. at 267-68, 273. Here, the search was conducted approximately 70 air miles north of the Mexican border and well to the north of the San Diego metropolitan area. The government concedes that the evidence must be suppressed if the rule announced in *Almeida-Sanchez* applies to this case.

Until *Linkletter* v. *Walker*, 381 U.S. 618 (1965), the Supreme Court traditionally applied new constitutional criminal-procedure standards retroactively

[1] We do not have before us the question of the effect of *Alameda-Sanchez* upon a conviction being tested in a collateral attack, and we express no opinion upon that.

in all cases. 381 U.S. at 628. *See generally* Haddad, *"Retroactivity Should be Rethought": A Call for the End of the Linkletter Doctrine*, 60 J. Crim. L., C. & P.S. 417, 425-26 (1969); Mishkin, *The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 56-57 (1965). In *Linkletter* the Court was required to decide whether *Mapp* v. *Ohio*, 367 U.S. 643 (1961), which overruled *Wolf* v. *Colorado*, 338 U.S. 25 (1949), should be given retroactive effect. After reviewing the history and theory of the problem of retroactivity, the Court concluded that the Constitution neither prohibits nor requires that the Court's decisions be applied retroactively. In each case the Court must determine whether retroactive or prospective application is appropriate. *Linkletter* v. *Walker*, 381 U.S. at 629.

In *Linkletter's* successors the Court devised a three-point test to determine whether or not to apply a new constitutional doctrine retroactively. The test looked to (a) the purpose to be served by the new standards, (b) the extent of reliance by law-enforcement officials on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. *See Stovall* v. *Denno*, 388 U.S. 293, 297 (1967).

However, for the doctrine of retroactivity to be relevant at all, the Court must have articulated a new doctrine.

> "An issue of the 'retroactivity' of a decision of this Court is not even presented unless the decision in question marks a sharp break in the

> web of the law. The issue is presented only when the decision overrules clear past precedent * * * or disrupts a practice long accepted and widely relied upon * * *." *Milton* v. *Wainwright*, 407 U.S. 371, 381-82, n.2 (1972) (dissenting opinion of Mr. Justice Stewart) (citations omitted).

See also Gosa v. *Mayden*, 413 U.S. 665, 672-73 (1973); *Michigan* v. *Payne*, 412 U.S. 47, 50-51 (1973); *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971); *Williams* v. *United States*, 401 U.S. 97, 106 (1971).

Linkletter itself fits into the first category—decisions overruling "clear past precedent"—since it involved the retroactivity of *Mapp* v. *Ohio*, *supra*, which overruled *Wolf* v. *Colorado*, *supra*. *See also Williams* v. *United States*, *supra*, involving the retroactivity of *Chimel* v. *California*, 395 U.S. 752 (1969), which reversed *United States* v. *Rabinowitz*, 339 U.S. 56 (1950), and *Harris* v. *United States*, 331 U.S. 145 (1947); *Fuller* v. *Alaska*, 393 U.S. 80 (1968) (per curiam), involving the retroactivity of *Lee* v. *Florida*, 392 U.S. 378 (1968), which overruled *Schwartz* v. *Texas*, 344 U.S. 199 (1952); *Desist* v. *United States*, 394 U.S. 244 (1969), involving the retroactivity of *Katz* v. *United States*, 389 U.S. 347 (1967), which specifically rejected *Goldman* v. *United States*, 316 U.S. 129 (1942), and *Olmstead* v. *United States*, 277 U.S. 438 (1928); *Tehan* v. *Shott*, 382 U.S. 406 (1966), involving the retroactivity of *Griffin* v. *California*, 380 U.S. 609 (1965),

which overruled *Twining* v. *New Jersey*, 211 U.S. 78 (1908).

Representative of cases within the second category —decisions disrupting "a practice long accepted and widely relied upon"— is *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), which held that *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), would not apply retroactively. The Court in *Johnson* observed that prior to *Miranda* and *Escobedo* it had expressly declined to condemn an entire process of in-custody interrogation solely because police had failed to warn accused persons of their rights or had failed to grant them access to outside assistance, and that law-enforcement agencies had relied upon the Court's acquiescence. 384 U.S. at 731. *See also Gosa* v. *Mayden*, *supra*, involving the retroactivity of *O'Callahan* v. *Parker*, 395 U.S. 258 (1969); *Adams* v. *Illinois*, 405 U.S. 278 (1972), involving the retroactivity of *Coleman* v. *Alabama*, 399 U.S. 1 (1970); *Halliday* v. *United States*, 394 U.S. 831 (1969) (per curiam), involving the retroactivity of *McCarthy* v. *United States*, 394 U.S. 459 (1969); *Stovall* v. *Denno*, *supra*, involving the retroactivity of *United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 218 (1967).

Almeida-Sanchez, by contrast, neither overruled past precedent of the Supreme Court nor disrupted long-accepted practice. Mr. Justice Stewart's opinion for the Court, after reviewing the Court's automobile-search decisions and its administrative-inspection decisions, concluded that neither line of authority

"provide[s] any support for the constitutionality of the stop and search in the present case * * *." 413 U.S. at 272.[2] Clearly, then, *Almeida-Sanchez* overruled no earlier Supreme Court precedent; rather, it reaffirmed well-established Fourth Amendment standards dating back to *Weeks* v. *United States*, 232 U.S. 383 (1914), and *Carroll* v. *United States*, 267 U.S. 132 (1925).

Nor did *Almeida-Sanchez* disturb a long-accepted and relied-upon practice. Although the government claims that it has relied upon judicial approval of roving searches prior to June 21, 1973, it has cited only one of our opinions, prior to our overruled decision in *Almeida-Sanchez*, holding that government agents on roving patrol can stop and search automobiles without either probable cause or warrant. *United States* v. *Miranda*, 426 F.2d 283 (9th Cir. 1970).[3]

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[2] Mr. Justice Powell, in his concurring opinion, also noted:

> "* * * [I] join in the opinion of the Court, which sufficiently establishes that none of our Fourth Amendment decisions supports the search conducted in this case * * *." 413 U.S. at 275.

[3] We concede that a number of other opinions do contain some dicta from which the government might infer that this court would uphold a roving-patrol search so long as it was conducted within the 100-mile area defined in 8 C.F.R. § 287.1. *See, e.g., Duprez* v. *United States*, 435 F.2d 1276, 1277 (9th Cir. 1970); *Fumagalli* v. *United States*, 429 F.2d 1011, 1013 (9th Cir. 1970); *United States* v. *Elder*, 425 F.2d 1002, 1004 (9th Cir. 1970); *Barba-Reyes* v. *United States*, 387 F.2d 91 (9th Cir. 1967); *Fernandez* v. *United States*, 321 F.2d 283 (9th Cir. 1963); *Contreras* v. *United States*, 291 F.2d 63 (9th Cir. 1961). Nonetheless, *United States* v. *Miranda*, *supra*, is

All of our other pre-*Almeida-Sanchez* decisions upholding roving-patrol searches away from the border involved stops that were predicated upon: (a) probable cause to believe that the automobile stopped was carrying illegal aliens or contraband, *see, e.g., United States* v. *Ardle*, 435 F.2d 861 (9th Cir. 1970), *cert. denied*, 402 U.S. 947 (1971); *cf. United States* v. *Kandlis*, 432 F.2d 132 (9th Cir. 1970); or (b) a reasonable certainty that any contraband which might be found in or on the vehicle at the time of the search was aboard the vehicle at the time it entered the United States, *see, e.g., Alexander* v. *United States*, 362 F.2d 379 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966); or (c) a reasonable certainty that the vehicle searched contained either goods which have just been smuggled or a person who has just crossed the border illegally. *See, e.g., United States* v. *Weil*, 432 F.2d 1320, 1323 (9th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971). *See generally* Note, *In Search of the Border: Federal Customs and Immigration Officers*, 5 N.Y.U.J. Int'l L. & Politics 93 (1972). Moreover, our line of decisions, and that of the Court of Appeals for the Tenth Circuit (*see, e.g., Roa-Rodriguez* v. *United States*, 410 F.2d 1206 (10th Cir. 1969), permitting roving searches by the border patrol, enjoyed only brief acceptance and failed its first test before the Supreme Court.

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the only case which has been called to our attention in which this court held that a stop and search conducted by immigration agents on roving patrol was proper.

The government fares no better in its alternate claim that it was relying not only on prior judicial approval of roving searches but also upon the literal command of Congress and a regulation authorizing such searches. Section 287(a)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1357(a)(3), provides for warrantless searches of automobiles and other conveyances "within a reasonable distance from any external border of the United States * * *." This section, enacted in 1952, revised in a manner not relevant here a statute enacted in 1946. Act of Aug. 7, 1946, ch. 768, 60 Stat. 865. Soon after the 1952 revision, the Attorney General promulgated regulations, one of which defined "reasonable distance" as "within 100 air miles from any external boundary of the United States * * *." 8 C.F.R. § 287.1(a)(2).

This statute and regulation must, however, be read in light of the Fourth Amendment; and when so understood, they merely delegate authority to be exercised by border-patrol agents in accordance with constitutional limitations. Without the statutory authorization conferred by § 287(a)(3), border-patrol agents would not have legal power to search private vehicles for aliens under any circumstances. Under the statute, they are permitted to conduct certain warrantless searches. But, unless the search qualifies as a border search, the statute should not be read, as this court has read it, to dispense with the requirement of probable cause as well as the requirement of a warrant.

When the Supreme Court reversed us in *Almeida-Sanchez*, it did not declare the statute unconstitutional; it merely read the Fourth Amendment requirement of probable cause into the right of border-patrol agents to conduct warrantless searches which were not the functional equivalents of border searches. Other sections of the same act had earlier been subjected to similar judicial constructions to avoid conflicts with constitutional standards. *See United States* v. *Almeida-Sanchez*, 452 F.2d 459, 465-67 (9th Cir. 1971) (dissenting opinion of Browning, J.), *rev'd*, 413 U.S. 266 (1973). Judicial interpretation of a statute and departmental regulation to eliminate conflict with the Fourth Amendment hardly qualifies as the kind of "new" constitutional rule sufficient to deny an appellant the fruits of his appeal.

Peltier is not claiming the benefit of any decision overruling or enlarging "then-applicable constitutional norms," *Williams* v. *United States*, 401 U.S. at 654; rather, he seeks the application of principles enunciated by Chief Justice Taft in 1925 in *Carroll* and consistently adhered to by the Supreme Court thereafter. This is a case not so much of the retroactivity of *Almeida-Sanchez* as of the continued vitality of *Carroll* and its successors. The Supreme Court in *Almeida-Sanchez* was not announcing a new legal doctrine, but correcting an aberration. Peltier is entitled to the benefit of the rule announced in *Almeida-Sanchez*, not because of retroactivity but because of Fourth Amendment principles never deviated from by the Supreme Court.

A Supreme Court decision overruling state or circuit decisions does not necessarily mark a departure from prior decisions of the Supreme Court. *Robinson* v. *Neil*, 409 U.S. 505 (1973). The Supreme Court faced the question whether *Waller* v. *Florida*, 397 U.S. 387 (1970), which barred duplicate prosecutions when a single act violated both state and municipal laws, was fully retroactive. The Court concluded:

> "* * * [T]his Court had not earlier had occasion to squarely pass on the issue. But its decision in *Waller* cannot be said to have marked a departure from past decisions of this Court. Therefore, while *Waller*-type cases may involve a form of practical prejudice to the State over and above the refusal to permit the trial that the Constitution bars, the justifiability of the State's reliance on lower court decisions supporting the dual sovereignty analogy was a good deal more dubious than the justification for reliance that has been given weight in our *Linkletter* line of cases * * *.
>
> "We hold, therefore, that our decision in *Waller* v. *Florida* is to be accorded full retroactive effect * * *." *Robinson* v. *Neil*, 409 U.S. at 510-11.

The conclusion which we have reached here may or may not be consistent with the result in the other circuits that have before them the application of *Almeida-Sanchez* to searches conducted prior to June 21, 1973. The Fifth Circuit recently held that *Almeida-Sanchez* is not to be given retrospective effect. *United States* v. *Miller* (5th Cir., No. 73-1083, 1974).

The decision does not mention three other cases in which the circuit applied *Almedia-Sanchez* retroactively without discussion. *See United States* v. *Speed*, 489 F.2d 478 (5th Cir. 1973); *United States* v. *McKim*, 487 F.2d 305 (5th Cir. 1973); *United States* v. *Byrd*, 483 F.2d 1196 (5th Cir. 1973). The Tenth Circuit also has applied *Almeida-Sanchez* to pending cases in which the search occurred prior to the decision in *Almeida-Sanchez*. *See United States* v. *King*, 485 F.2d 353, 359 (10th Cir. 1973); *United States* v. *Maddox*, 485 F.2d 361, 363 (10th Cir. 1973).

The judgment of conviction is reversed, and the matter remanded to the district court with instructions to suppress the evidence seized in the search of Peltier's automobile.

Judges Chambers, Merrill, Browning, Duniway, Ely and Hufstedler concur in this majority opinion.

WALLACE, Circuit Judge, Dissenting:

I respectfully dissent.

The majority does not attempt to justify retroactively based upon the tests of *Linkletter* v. *Walker*, 381 U.S. 618 (1965), and *Stovall* v. *Denno*, 388 U.S. 293 (1967). Rather it asserts that before the question of retroactivity even becomes relevant, we must decide whether the Court in *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), articulated a "new" constitutional rule. In order to be new, the majority contends, the constitutional rule must over-

rule "clear past precedent" or disrupt "a practice long accepted and widely relied upon." This threshold test comes from a footnote in Justice Stewart's dissent in *Milton* v. *Wainwright*, 407 U.S. 371, 381-82 n.2. (1972). As we noted in *United States* v. *Bowen*, —— F.2d ——, —— n.1 (9th Cir. 1974), it is unclear whether this abridged test should be applied in all cases. But even applying the test adopted by the majority, I disagree that the *Almeida-Sanchez* pronouncement is not new and, therefore, I believe the *Stovall* test is relevant.

The majority contends that the appropriate interpretation of the Supreme Court's holding in *Almeida-Sanchez* demonstrates that the rule is not new and dictates retroactivity. But the majority, falling into the same error as the majority did in Part I of *United States* v. *Bowen*, —— F.2d ——, —— (9th Cir. 1974) (Wallace, J. dissenting), fails to distinguish between where a majority of Justices has made a pronouncement and where it has not. Justice White, writing for himself and three other Justices, reviewed decisions of each of the courts of appeals having jurisdiction over districts bordering Mexico and concluded:

> [T]hose courts and judges best positioned to make intelligent and sensible assessments of the requirements of reasonableness in the context of controlling illegal entries into this country have consistently and almost without dissent come to the same conclusion that is embodied in the judgment that is reversed today.

413 U.S. at 298 (footnote omitted). Justice Powell, although concurring in the Opinion of the Court, agreed with Justice White's conclusion on this point:

> Roving automobile searches in border regions for aliens, likewise have been consistently approved by the judiciary. While the question is one of first impression in this Court, such searches uniformly have been sustained by the courts of appeals whose jurisdictions include those areas of the border between Mexico and the United States where the problem has been most severe.

413 U.S. at 278. The tenor of these statements, representing five of the nine Justices, seems more consistent with the conclusion that *Almeida-Sanchez* established a new constitutional rule.

I

Even ignoring that a majority of the Supreme Court may well believe that *Almeida-Sanchez* constitutes a new rule, the test adopted by the majority, when properly applied, also demonstrates that the rule of *Almeida-Sanchez* is new. Under the first alternative of the majority's test, a decision constitutes a new constitutional rule if it overrules "clear past precedent." It cannot be contended that to meet this alternative, the Supreme Court must reverse one of its prior decisions. On the contrary, as we held in *United States* v. *Bowen*, —— F.2d ——, —— (9th Cir. 1974): "The test does not require . . . that the

Supreme Court reverse itself in order for there to be an overruling of clear past precedent."

Prior to *Almeida-Sanchez*, the courts of appeals gave no indication that roving stops and searches were unconstitutional. *See, e.g., United States* v. *Miranda*, 426 F.2d 283 (9th Cir. 1970); *Roa-Rodriguez* v. *United States*, 410 F.2d 1206 (10th Cir. 1969). *See United States* v. *McDaniel*, 463 F.2d 129 (5th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973). The majority contends that this stream of judicial pronouncements is a mere aberration. However, these consistent holdings can hardly be said to a deviation from the law when 35 of 36 judges who have considered the question in the three circuits involved in enforcing the immigration laws along our Mexican border have upheld immigration stops and searches. *Almeida-Sanchez* v. *United States*, 413 U.S. at 298-99 n.10 (White, J. dissenting). *Almeida-Sanchez* does overrule clear past precedent.

The majority's treatment of the statute pursuant to which the Border Patrol acted also deserves attention. Since 1952, searches for aliens within a reasonable distance from the border have been authorized by Congress. 8 U.S.C. § 1357(a)(3). Merely stating, as does the majority, that statutes have to be measured by the Constitution only begs the question. As we held in *United States* v. *Bowen*, —— F.2d ——:

> Although it is true that statutes have to be measured by the Constitution, a legally enacted statute becomes the law until it is vitiated by a court decision. Where the constitutionality of the statute has been repeatedly upheld by the lower courts, it becomes a clear precedent for law enforcement action. Prior statutory law should be treated no differently from prior case law.

The identical statute which we held to be clear past precedent in *Bowen* is involved in this case. There we held that in applying the first alternative of the threshold test, "[p]rior statutory law should be treated no differently from prior case law." *United States* v. *Bowen*, —— F.2d at ——. I, therefore, fail to see why *Almeida-Sanchez* does not overrule clear past precedent, both statutory and case law.

II

Under the second alternative of the majority's test, a decision constitutes a new constitutional rule if it "disrupts a practice long accepted and widely relied upon." Justice Stewart, in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971), formulated the second alternative in language that adds an additional dimension. He stated that a decision may constitute a new rule either by overruling past precedent (the first alternative of the majority's test) "or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . ." Under the *Chevron Oil* formulation of the test, *Almeida-Sanchez* clearly constitutes a new rule. First, the majority concedes that this issue has not previously been presented to the Supreme Court, making it by definition "an issue of first impression" before that Court.

Second, the resolution of an issue that would invalidate immigration stops and searches was not foreshadowed. As Justice White stated:

> . . . I cannot but uphold the judgment of Congress that for purposes of enforcing the immigration laws it is reasonable to treat the exterior boundaries of the country as a zone, not a line, and that there are recurring circumstances in which the search of vehicular traffic without warrant and without probable cause may be reasonable under the Fourth Amendment although not carried out at the border itself.
>
> This has also been the considered judgment of the three Courts of Appeals whose daily concern is the enforcement of the immigration laws along the Mexican-American border, and who, although as sensitive to constitutional commands as we are, perhaps have a better vantage point than we here on the Potomac to judge the practicalities of border-area law enforcement and the reasonableness of official searches of vehicles to enforce the immigration statutes.

Almeida-Sanchez v. *United States*, 413 U.S. at 294-95. Numerous appellate court cases have dealt with this issue and yet, the result prior to *Almeida-Sanchez* was consistently to uphold the stop and search. There simply was no foreshadowing of the *Almeida-Sanchez* rule.

However, even under the majority's formulation of the second alternative, *Almeida-Sanchez* still constitutes a new rule. The majority reaches an opposite conclusion by contending that there is only one prior decision in our circuit squarely upholding the roving

patrol search. The majority observes in a footnote that, in cases dating back to 1961, we have approved similar immigration searches —— F.2d at ——, n.3, but discounts all of those cases on the basis that any approving language is dicta. The majority, however, fails to explain why this classification should make a difference. The cases, whether or not the language is dicta, are important because they demonstrate a long accepted practice that has been widely relied upon. Apparently four Justices of the Supreme Court did not make such a distinction, for Justice White stated in reference to our circuit:

> [U]nder § 1357(a)(3), automobiles may be stopped without warrant or probable cause and a limited search for aliens carried out in those portions of the conveyance capable of concealing any illegal immigrant. *This has been the consistent view of that court.*

Almeida-Sanchez, 413 U.S. at 295 (White, J. dissenting) (emphasis added).

Not only has the Border Patrol been following a practice sanctioned by our prior cases, it has also been complying with 8 U.S.C. § 1357(a)(3) in making roving patrol stops. The statute explicitly authorizes immigration officials, within a reasonable distance of the border, to search vehicles without a warrant for illegal aliens. The statute in its present form was adopted in 1952. Since 1963, we have upheld the constitutionality of the statute. *Fernandez* v. *United States*, 321 F.2d 283 (9th Cir. 1963). A law enforcement practice, authorized for over a dec-

ade, adequately meets the second requirement of the majority's threshold test.

III

If either alternative of the majority's threshold test is met, *Almeida-Sanchez* states a new rule. Here, both alternatives are met and, therefore, retroactively should be judged by the *Stovall* test. Applying that test and for reasons similar to those stated in Part II of *United States* v. *Bowen*, —— F.2d at ——, I would hold that the retroactivity test would require prospective application in this case.[1] As the Court stated in *Linkletter* v. *Walker*, 381 U.S. at 637:

[1] The majority's disclaimer in footnote 1, reserving the question of the application of *Almeida-Sanchez* to collateral attacks upon prior convictions, does not minimize the potential havoc the majority's ruling could have on the administration of justice. Because of its retroactivity stance, any distinction between a defendant with a case on appeal at the time of the *Almeida-Sanchez* decision and the countless others whose convictions were final prior to that time would be artificial at best. It appears to me that if the Court in *Almeida-Sanchez* did not enunciate a new rule, all convictions based upon evidence obtained during a roving patrol search without warrant or probable cause must be reversed, regardless of whether they are now final or on direct review. This conclusion is supported by the Court's statement in Stovall v. Denno, 388 U.S. 293, 300 (1967):

> We also conclude that, for these purposes, no distinction is justified between convictions now final, as in the instant case, and convictions at various stages of trial and direct review.

As Justice White said in Williams v. United States, 401 U.S. 646, 656 (1971):

[Footnote continued on page 19a]

> In rejecting the *Wolf* doctrine as to the exclusionary rule the purpose was to deter the lawless action of the police and to effectively enforce the Fourth Amendment. That purpose will not at this late date be served by the wholesale release of the guilty victims.

Judges Koelsch, Wright, Trask, Choy and Sneed concur in this dissenting opinion.

[1] [Continued]

> [I]t should be clear that we find no constitutional difference between the applicability of *Chimel* to those prior convictions that are here on direct appeal and those involving collateral proceedings.

Three other Justices joined in Justice White's opinion and Justice Marshall's dissent can be considered to be in harmony with the language quoted to the extent that he would apply the *Stovall* test in cases that are before the Court on collateral attack.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-2509
DC #14780

UNITED STATES OF AMERICA, APPELLEE

vs.

JAMES ROBERT PELTIER, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded to the District Court

with instructions to suppress the evidence seized in the search of Peltier's automobile.

[SEAL]

A TRUE COPY
ATTEST 6/20/74

EMIL E. MELFI, JR.
Chief Deputy and Acting Clerk

By /s/ Ray Hewitt
RAY HEWITT
Senior Deputy

Filed and entered May 9, 1974

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